

A **RAMBA BUNGKONG & ORS v. ASCO GREEN SDN BHD**

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
RHODZARIAH BUJANG JCA
NOR BEE ARIFFIN JCA

B [CIVIL APPEALS NO: Q-02(IM)(NCVC)-2507-12-2017 &
Q-01(IM)(NCVC)-476-12-2017]
24 JUNE 2020

C **CIVIL PROCEDURE:** *Summary disposal – Rules of Court 2012, O. 14A – Determination of preliminary questions of law – Whether applications suitable to be disposed of summarily – Whether pleadings and affidavits comprehensive and sufficient to determine and dispose of core issues in claim – Whether action ought to go for proper trial – Whether application under O. 14A appropriate*

D **LAND LAW:** *Native customary rights – Claim for – Whether claims over native customary rights involved critical issues of facts and law – Whether action ought to go for proper trial – Whether claimants had cause of action – Whether pleadings and affidavits comprehensive and sufficient to determine and dispose of core issues in claim – Summary disposal – Whether application under O. 14A of Rules of Court 2012 appropriate*

E The respondent ('plaintiff') was the registered proprietor of the parcel of land containing an area of 707 hectares ('Lot 130'). Lot 130 was formerly a provisional lease registered in the plaintiff's name ('provisional lease'). On 2 September 2014, the provisional lease was replaced with the issue of document of title for Lot 130. By a letter dated 7 January 2015 to the Chief
F Minister of Sarawak, the appellants ('defendants') who were Iban by race together with Tuai Rumah Chabu Ak Makum of Rumah Chabu, had asked for the revocation of the provisional lease. Subsequently, the defendants, led by the first defendant ('D1') came to the plaintiff's camp on Lot 130 and stopped the plaintiff's contractor's workers from doing their work. D1 was
G the Tuai Rumah of Rumah Ramba of Sungai Liam. The defendants claimed that they were, the proprietors, occupiers, holders and claimants of native customary rights ('NCR') of the land situated at or around Sungai Liam which included Lot 130. They claimed that they had created and/or acquired and/or inherited their NCR land since the 1830's and that Lot 130 was their
H reserved forest or *pulau galau* which had been reserved for many generations, well before the issuance of the title to the plaintiff. It was the plaintiff's pleaded case that despite the allegations that the defendants owned NCR over Lot 130, the longhouses of Rumah Chabu and Rumah Ramba did not lie within the boundaries of Lot 130, nor did the defendants cultivate the said
I land. Sometime in July 2015, the defendants took possession of Lot 130. The plaintiffs claimed that the defendants had illegally entered into Lot 130 and was in wrongful occupation thereof. In the statement of claim ('SOC'), the plaintiff sought to recover the possession of Lot 130 and an injunction to

restrain the defendants from entering the said land and damages. The defendants filed a counterclaim and sought several reliefs, amongst others, a declaration that they had created, acquired and inherited their NCR land since the 1830's and that the issuance of Lot 130 to the plaintiff, in so far as the extent of the area under the said land overlapped and/or covered the defendants' NCR land, was unlawful, improper, unconstitutional and therefore null and void for want of extinguishment of the defendants' NCR over the said land. The defendants also filed third party proceedings, claiming, in essence, that the alienation to the plaintiff of Lot 130 was unlawful, unconstitutional and therefore null and void as the issuance of the title was without first obtaining their prior informed consent, and that the provisions of the Land Code (Sarawak)(Cap 81) ('Sarawak Land Code') on compensation was not followed when there was no extinguishment of the defendants' NCR over Lot 130. The Judicial Commissioner ('JC') allowed the applications by the plaintiff and the third parties under O. 14A of the Rules of Court 2012 ('ROC') in encl. 51 and encl. 69, respectively, to have certain preliminary questions of law determined. The JC was of the opinion that the two applications were amply suitable to be disposed of summarily. Hence, the present appeals. The grounds of appeal submitted by the defendants were, *inter alia* (i) that the action ought to go for a proper trial and not by way of affidavits as the defendants' claims over NCR involved critical issues of facts and law; and (ii) the JC erred in law in not appreciating that the issuance of title over unextinguished NCR land was illegal, null and void under the Sarawak Land Code and such area of the land that was encumbered by NCR land ought to be excised out of the land title.

Held (dismissing appeals)

Per Nor Bee Ariffin JCA delivering the judgment of the court:

- (1) There was no dispute that the plaintiff was the registered proprietor of Lot 130. The alienation of Lot 130 to the plaintiff had already taken effect even before the defendants wrote to the Chief Minister *vide* a letter dated 7 January 2015 to ask for the revocation of the provisional lease. The defendants knew of the grant of provisional lease granted to the plaintiff since 22 July 2013 but did nothing to assert their NCR then. Despite the defendants' claim that their NCR over Lot 130 was created and/or acquired prior to 1 January 1958 and still subsisted as such, the defendants were not issued with any title over the land. The defendant had not shown that their NCR had been created over Lot 130 in the manner prescribed under s. 5(2) of the Sarawak Land Code. On the authority of the case of *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals*, s. 132 of the Sarawak Land Code pertaining to the plaintiff's indefeasibility of title remained applicable and the NCR claim, if any, did not defeat the indefeasibility of title of the plaintiff. There was no reason why the case must go for trial on this specific issue. (paras 35, 58 & 59)

- A (2) The law is that where the State land is encumbered by the native's NCR, no alienation shall take place until all NCR had been surrendered or terminated or provisions for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with. With the legal status of *pemakai menoa* and *pulau galau* having been firmly established by the Federal Court in the case of *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* to have no force of law, such customary practices did not create rights or ownership to Lot 130 and they could not be grounds for claims of NCR. Since the defendants did not have any NCR rights in or over Lot 130, any elements of extinguishment were not relevant. There was therefore no unconstitutional act by the third parties for the alleged claims made by the defendants. The JC was correct in his findings that the defendants had no cause of action against the third parties for claiming NCR over Lot 130. (para 87)
- B
- C
- D (3) After perusing the pleadings and the affidavits by the plaintiffs, the defendants and the third parties, it was obvious from the grounds of judgment that His Lordship had scrutinised the pleadings and the affidavits of the parties as he ought to have done, in his attempts to identify the material facts pleaded which were obviously undisputed or ought not to have been disputed. The undisputed facts and admissions made by the defendants as apparent from the pleadings and the affidavits, were comprehensive and sufficient to determine and dispose of the core issues in the claim. There was no substance in the defendants' contentions that their claims over NCR involved material disputes of facts that ought to go for a proper trial. (paras 34 & 36)
- E
- F
- G (4) The questions of law posed by the plaintiff and the third parties were clear cut and definite, discernible from the pleadings. The JC had correctly decided that the questions of law posed were suitable for determination without the full trial of the action and such determination would be final as to the entire claim and the counterclaim. From a factual perspective, it was apparent that there were no disputed material facts or facts which ought not to have been disputed that would render the application under O. 14A inappropriate. There were also no issues of fact interwoven with legal issues raised. (paras 51 & 52)
- H **Case(s) referred to:**
Bank Kerjasama Rakyat Bhd & Ors v. Hj Mat Hj Ahmad [2007] 2 CLJ 655 HC (*refd*)
Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors [2013] 6 CLJ 805 FC (*refd*)
Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 FC (*refd*)
- I *Director Of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* [2017] 5 CLJ 389 FC (*refd*)
Director Of Sarawak And Ors v. Nicholas Mujah Anak Ason And Ors (Application No. 08-130-03-2014(Q) (Unreported) (refd)

- Douglas Ding Jangan & Ors v. Government Of Sarawak & Ors* [2019] 4 CLJ 18 CA (*refd*) A
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2007] 6 CLJ 741 CA (*refd*)
Government Of Sarawak & Anor v. Busing Anak Jali & Ors And Another Appeal [2019] 4 CLJ 179 CA (*refd*)
Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC (*refd*)
Jeli Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors And Another Appeal [2019] 8 CLJ 598 CA (*refd*) B
Kerajaan Negeri Kelantan v. Petroliaam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC (*refd*)
Narinder Kaur v. Deyoh Opong & Ors [1997] 2 CLJ 895 HC (*refd*)
Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC (*refd*)
Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC (*refd*) C
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA (*refd*)
Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC (*refd*)
Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2008] 2 CLJ 686 CA (*refd*)
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC (*refd*) D
Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA (*refd*)
Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC (*refd*)
TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals [2018] 1 CLJ 19 FC (*refd*) E
Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC (*refd*)
TR Aling Anak Anggau & Ors (Suing For And On Behalf Of The Residents Of Rh Aling) v. Government of Malaysia & Ors [2013] 10 MLJ 131 (*refd*)
Yam Kong Seng & Anor v. Yee Weng Kai [2014] 6 CLJ 285 FC (*refd*) F
Legislation referred to:
Evidence Act 1950, s. 83(1)
Federal Constitution, art. 160
Rules of Court 2012, O. 14A, O. 33 r. 2
Land Code (Sarawak)(Cap 81), ss. 5(2), 132
Other source(s) referred to: G
Malaysian Civil Procedure 2015, Sweet & Maxwell, p 130
Malaysian Court Practice, Practitioner edn, pp 125-127
(Civil Appeal No: Q-01(IM)(NCVC)-476-12-2017)
For the appellants - Simon Siah SY Jen; M/s Simon Siah, Chua & Chow Advoc
For the respondents - Mohd Adzrul Adzlan; SLA H
(Civil Appeal No: Q-02(IM)(NCVC)-2507-12-2017)
For the appellants - Simon Siah SY Jen; M/s Simon Siah, Chua & Chow Advoc
For the respondent - Gabriel Kok; M/s Khoo & Co
[Editor's note: Appeal from High Court, Miri; Suit No: MYY-22NCVC-11-8-2016 (HC) (affirmed).] I
Reported by Suhainah Wahiduddin

A JUDGMENT

Nor Bee Ariffin JCA:

The Appeals

B [1] These two Appeals No. Q-01(IM)(NCVC)-476-12-2017 (“Appeal No. 476”) and No. Q-02(IM)(NCVC)-2507-12-2017 (“Appeal No. 2507”) emanate from the decision of the learned Judicial Commissioner (“JC”) on 3 November 2017 in allowing the applications by the respondent and the third parties under O. 14A of the Rules of Court 2012 (“ROC”) in encl. 51 and encl. 69 respectively, to have certain preliminary questions of law determined. The learned JC was of the opinion that the two applications were amply suitable to be disposed of summarily.

D [2] In granting the application in encl. 51, the learned JC had struck out the appellants’ defence and counterclaim against the respondent and allowed the respondent’s claims. The appellants’ appeal against this decision is the Appeal No. 2507.

[3] Similarly, as regards encl. 69, the learned JC had struck out the appellants’ statement of claim against the third parties. The appellants’ appeal against this decision is the Appeal No. 476.

E [4] We heard the two appeals together because of overlapping issues and there are common questions of law. We have carefully considered learned counsels’ oral and written submissions and the appeal records. We find no appealable error in the learned JC’s findings and application of the law to warrant our intervention. We unanimously affirmed the decisions of the learned JC and dismissed the appellants’ appeals. We now give our reasons.

F [5] For convenience, the parties will be referred to as they were before the High Court.

The Background Facts

G [6] The plaintiff is the registered proprietor of the parcel of land situated at between Sungai Liam and Sungai Nyabor, Bakong, Sarawak containing an area of approximately 707 hectares and described as Lot 130, Block 3, Bakong Land District, Sarawak (“Lot 130”). Lot 130 was formerly a provisional lease described as Lot 236 Bakong Land District registered in the plaintiff’s name on 15 April 2013 (“provisional lease”). On 2 September 2014, the provisional lease was replaced with the issue of document of title for Lot 130.

I [7] The plaintiff said that in order to comply with the title conditions that Lot 130 must be fully planted with oil palm crops by 15 April 2018, they had commenced the preliminary works, including setting up camps buildings for workers and machineries.

- [8] By a letter dated 7 January 2015 to the Chief Minister of Sarawak, the defendants who are Iban by race together with Tuai Rumah Chabu Ak Makum of Rumah Chabu, had asked for the revocation of the provisional lease. The letter was copied to the plaintiff. A
- [9] In the second half of January 2015, the defendants led by the first defendant (“D1”) came to the plaintiff’s camp on Lot 130 and stopped the plaintiff’s contractor’s workers from doing their work. D1 is the Tuai Rumah of Rumah Ramba of Sungai Liam. B
- [10] The defendants claimed that they were at all material times the proprietors, occupiers, holders and claimants of native customary rights (“NCR”) of land situated at or around Sungai Liam, Bakong, Sarawak which include Lot 130. They had created and/or acquired and/or inherited their NCR land since 1830s and that Lot 130 was their reserved forest or *pulau galau* which have been reserved for many generations, well before the issuance of the title to the plaintiff. C
- [11] It was the plaintiff’s pleaded case that despite the allegations that the defendant owned NCR over Lot 130, the longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of Lot 130, nor did the defendants cultivated the said land. Lot 130 was formerly under a timber license with forestry activities since 1994. D
- [12] There were efforts made by the resident’s office, Miri to facilitate amicable discussion with the inhabitants and representatives of Rumah Chabu, the defendants and the plaintiff. The plaintiff pleaded that the inhabitants of Rumah Chabu had settled amicably and that they had acknowledged the plaintiff’s ownership of Lot 130 and even issued a letter dated 26 February 2015 to confirm the same. The defendants however refused to settle. E
- [13] Sometime in July 2015, the defendants took possession of Lot 130.
- [14] The plaintiff claimed that the defendants had illegally entered into Lot 130 and was in wrongful occupation thereof. In the statement of claim (“SOC”), the plaintiff sought to recover the possession of Lot 130 and an injunction to restrain the defendants from entering the said land and damages. F
- [15] The defendants’ defence was that the issuance of title of Lot 130 to the plaintiff was null and void as it overlapped and/or covered the defendants’ NCR land. As the rightful owners, the defendant said they did not require license or consent from the plaintiff when entering their own NCR land. Conversely, it was the plaintiff who was guilty of encroachment onto the defendants’ NCR land. G
- [16] The defendants filed a counterclaim and sought several reliefs, amongst others, a declaration that they had created, acquired and inherited their NCR land since 1830s and that the issuance of Lot 130 to the plaintiff, insofar as the extent of the area under the said land overlapped and/or H I

A covered the defendants' NCR land, was unlawful, improper, unconstitutional and therefore null and void for want of extinguishment of the defendants' NCR over the said land.

B [17] The defendants also filed third party proceedings, claiming in essence that the alienation to the plaintiff of Lot 130 was unlawful, unconstitutional and therefore null and void as the issuance of the title was without first obtaining their prior informed consent, and that the provisions of Land Code (Sarawak)(Cap 81) on compensation was not followed when there was no extinguishment of the defendants' NCR over Lot 130. The reliefs sought were substantially the same as in the counterclaim.

C [18] The third parties' defence relied on the decision of *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1 and *Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors* [2013] 6 CLJ 805; [2013] 5 MLJ 149, to state that *pemakai menoa* and *pulau galau* are not customs and usage which have the force of law, and hence
D no NCR could have been created over this area. The third parties also contended that the issuance of the provisional lease now known as Lot 130 was in accordance with the Sarawak Land Code.

E [19] In encl. 51, the following three questions of law were framed for determination:

(a) whether the Plaintiff who is the registered proprietor of Lot 130 Block 3 Bakong Land District by virtue of the issue document of title for the Lease of State Land over Lot 130 Block 3 Bakong Land District issued by the Superintendent of Lands and Surveys; holds an indefeasible title;

F (b) whether the Defendants who are claiming that native customary rights over the Plaintiff's Lot 130 Block 3 Bakong Land District by virtue of the Defendants' allegation that the same area is their customary forest reserve; does such a custom even if proven, have any force of law against the Plaintiff;

G (c) whether the Defendants, who do not have any settlement or cultivation on the Plaintiff's Lot 130 Block 3 Bakong Land District; are entitled as a matter of law to claim native customary rights over the said Lot 130 Block 3 Bakong Land District.

H [20] The parties filed three affidavits each in this application. The plaintiff's affidavits were affirmed by Sim Kuang Heng, their operation manager (encls. 52, 57 and 62). The defendants' affidavits were affirmed by their solicitors, Siah Sy Jen (encls. 56 and 61) and by D1 (encl. 61).

[21] In encl. 69, the question of law sought for determination reads:

I whether having regard to the pleading and the case of *Director of Forest, Sarawak & Anor v. TR Sandah Ak Tabau & 7 Ors and Other Appeals* [2017] 3 CLJ 1 and *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands*

and Surveys Kuching Division & Ors [2013] 5 MLJ 149 the Defendants have any cause of action against the 1st, 2nd and 3rd Parties for claiming native customary rights over forested area, which are still primary forest. A

[22] This application was supported by affidavits affirmed by Catherine Uno ak Sebastian Janting who is a land officer with the Land and Surveys Department, Miri Division (“Catherine/encl. 71”) and by Alexius bin Andrew who is an assistant photogrammetry officer at the Land and Survey Department Headquarters (“Alexius”/encls. 70 and 82). D1 filed an affidavit in opposition (encl. 78). B

Grounds Of Appeal

[23] The grounds of appeal in essence are similar for both the appeals except that for Appeal No. 476, there is an additional ground relating to the aerial photograph interpretations. For ease of reference, the grounds of appeals are summarised below: C

- (i) the action ought to go for a proper trial and not by way of affidavits as the defendants’ claims over NCR involved critical issue of facts and law; D
- (ii) the learned JC should not have relied on the decision in *TR Sandah Tabau (supra)* because that decision is not the correct principle of law as there was no majority decision on the questions of law posed in the Federal Court and that the decision is only confined to the facts of the case itself; E
- (iii) the learned JC should have followed the decision in *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 and *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 which is still the correct position of law pertaining to claims over NCR land; F
- (iv) the learned JC erred in law in not appreciating that the issuance of title over unextinguished NCR land is illegal, null and void under the Sarawak Land Code and such area of the land that is encumbered by NCR land ought to be excised out of the land title; and G
- (v) as regards Appeal No. 476, the learned JC erred when referring and relying on the aerial photograph interpretations which were prepared by the third parties for the sole purpose of this suit and tendered only by way of affidavit when the same ought to be tendered through a proper trial. H

Our Decision

The Suitability And Applicability Of Order 14A

[24] There are settled and established principles in our case law authorities that had firmly determined the ambit and the application of O. 14A of the ROC (to cite a few, see *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2008] I

- A 2 CLJ 686; *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299; *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 (COA) which was approved by the Federal Court in *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 7 CLJ 597; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741; [2008] 2 MLJ 812; and
- B *Director Of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* [2017] 5 CLJ 389).

C [25] The cornerstone of the defendants' defences ("SOD"), the counterclaim and the claim against the third parties centred on the defendants' claim that they had acquired and/or created NCR over Lot 130 long before the issuance of the provisional lease to the plaintiff by the third parties. At para. 25 of the counterclaim and para. 5 of the statement of claim against the third parties (SOC against the third parties), the defendants particularised their ancestors' occupancy as reproduced below:

- D (a) that the defendants had created and acquired the NCR Land since 1830s which is much earlier than 1.1.1958. The issuance of the said Lease to the plaintiff was just recently in the year 2014;
- E (b) the defendants are all from Rumah Ramba which is in close proximity to the said Lease or land in dispute coloured in yellow in the map M. The approximate distance to the closest point of the said Lease from Rumah Ramba is only about a few minutes walk;
- F (c) the areas within the said Lease is within the pemakai *menua/menao* (territorial domain) of the defendant and consist of *pulau galau* (reserved forest) and *temuda*;
- G (d) the first Tuai Rumah who occupied the said NCR Land was TR Jampo anak Dawi who first settled at Tembawai Lubuk Nibong in the early 1830s. Tembawai Lubuk Nibong is located just next to the said Lease. At the said Tembawai Lubuk Nibong, there is also a Pendam Lubok Nibong not far away;
- H (e) TR Jampo anak Dawai moved within the pemakai *menua/menao* to Tembawai Sirih and was later replaced by TR Limpeng anak Jampo. TR Limpeng anak Jampo also moved within the *pemakai menua/menao* to Tembawai Sabut. At Tembawai Sabut he was replaced by Rundang anak Jampo. TR Rundang anak Jampo moved to three areas within the *pemakai menua/menao* namely Tembawai Sungai Labi, Tembawai Jipon and Tembawai Pisang;
- I (f) TR Rundang anak Jampo was replaced later by TR Empaga anak Ambau at Tembawai Pisang. The villagers later moved to Tembawai Angus sometime in 1985 led by the ex-TR Bundan anak Limpeng. Tembawai Angus was named as such because the longhouse at that time was burnt down and therefore the villagers had to move to the current location which is not far away from the Tembawai Angus;

- (g) the *pulau galau* within the disputed areas were used as the hunting grounds for the defendants and their forefathers. The *pulau galau* is also used for the defendants to search for jungle produce, collect rattan and other necessities to meet the defendants' domestic needs pursuant to their adat or custom; A
- (h) the ancestors of the defendants had occupied the areas within the said NCR land years before 1958 pursuant to and by virtue of their adat or customs as Ibans of Sarawak. The defendants have never abandoned their NCR over the said NCR Land; B
- (i) the defendants' NCR over the said Lease was also recognised by the Sarawak Government even in 1939; C
- (j) the defendants' ancestors were also given identity cards dated back in 1912 which show that they have been residing along Sungai Liam, Bakong, Baram; C
- (k) the defendants had cultivated part of the said NCR Land as their gardens, farms and plantations even before the said Lease was issued and before the plaintiff encroached into the defendants' said NCR Land. D
- [26] At para. 26 of the counterclaim and para. 7 of the SOC against the third parties, the defendant pleaded that from the NCR land, which comprises of farmland and forest, the defendants derived food, valuable medicines, wildlife and other forest produce for their livelihood and sustenance. They also farmed, cultivated and planted padi, fruit trees and recently, palm oil and other essential trees and crops on the said NCR land necessary for their survival as a community. E
- [27] The map marked "M" was intended to illustrate the approximate delineation of the boundary of their NCR land and the extent of it, their settlement of Rumah Ramba and the river Sungai Liam which separates Rumah Ramba from Lot 130. F
- [28] Given the long historical facts regarding the occupancy of the NCR land by the defendants' forefathers that went way back to the 1830s, learned counsel for the defendants argued that there was obviously disputed questions of fact and triable issues, which disentitled the filing of encls. 51 and 69. G
- [29] The defendants claimed they had amply demonstrated in their pleadings why their claim of NCR on Lot 130 should rank priority over and supersede the plaintiff's right as the registered proprietor and therefore, the preliminary determination of the questions of law was not the appropriate procedure. In submitting the way that he did, learned counsel for the defendants took the position, as we understood it to be, that for cases involving issues of NCR, there ought to be proper examination of the facts through a proper trial and the court should abstain from deciding the cases summarily. We however take a different view. H I

A [30] As stated by the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* (*supra*), even if the case appears to be or is complicated, the court must not shun from considering the applicability of O. 14A and O. 33 r. 2 of the ROC in relation to the questions posed. A case involving a claim on NCR, in our view is no exception. Everything boils down to the question of whether the requirements for summary determination of the questions of law are present and satisfied, based on the relevant facts and circumstances of each case.

C [31] The test of whether the question of law or construction is suitable to be determined under O. 14A was dealt with by the Federal Court in *Racha Urud* (*supra*) at p. 403 wherein reference was made to the commentary on O. 14A appearing in the *Malaysian Court Practice (Practitioner Edition)* at pp. 125 to 127 which states – “The test of whether the question of law or construction is ‘suitable’ to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action ...”.

E [32] In *Racha Urud*, the Federal Court held that an application under O. 14A is to decide clear points of law or construction apparent on the pleadings and one primary task which must be undertaken by the court in deciding on the suitability and applicability of the order is to consider whether the pleadings disclose any dispute on the material facts. The apex court observed that “pleadings must cover a wide range of cause papers. The only cause papers available in our instant case are the statement of claim, the defence, reply and the affidavits in support of the O. 14A applications.” (See also *Bank Kerjasama Rakyat Bhd & Ors v. Hj Mat Hj Ahmad* [2007] 2 CLJ 655; [2007] 3 MLJ 541 where the High Court held that the scope of enquiry in an O. 14A application includes an examination of the affidavit evidence).

G [33] It may be useful to briefly refer to the following excerpt from the *Malaysian Civil Procedure 2015* (Sweet & Maxwell) at p. 130 on the principles governing the application of O. 14A:

H The outcome of an application under Order 14A does not need to dispose of the entire case. It is sufficient if substantial matters in the case can be disposed of: *Petroliam Nasional Bhd & Anor v. Kerajaan Negeri Terengganu* [2003] 5 AMR 696; [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA; of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2008] 1 AMR 105; [2008] 2 MLJ 812. The issue to be determined should be a core legal issue that may for practical purposes turn out to be determinative of the case; *Rockwin Enterprise Ltd v. Shui Yee Ltd* [2003] 3 HKC 174 at 184; *Netwell Properties Ltd v. JCG Finance Co Ltd* [2003] 4 HKC 566, CA (HK).

I

An application under Order 14A is inappropriate if:

(a) There are conflicting allegations of fact. All material facts relating to the subject matter of the claim must be undisputed or admitted; and not on the basis of assumed facts. If cannot be invoked on the basis of assumed facts. The court should not give a ruling under Order 14A *in vacuo* or based on hypothetical facts: ...

(b) The issues of fact are interwoven with legal issues raised. The court will not split the legal and factual determination for to do so would in effect be to give rulings *in vacuo* or on a hypothetical ruling; ...

The court will in an Order 14A application determine the issues of law upon the construction of documents whenever it appears to the court that the determination of any question of law will lead to a final conclusion of the action because there are no facts in dispute: *Danaharta Managers Sdn Bhd v. Melewar Leisure Sdn Bhd & Ors* [2008] 4 AMR 553; [2008] 4 MLJ 448.

[34] We had carefully perused the pleadings and the affidavits by the plaintiffs, the defendants and the third parties. It was obvious to us from the grounds of judgment that His Lordship had scrutinised the pleadings and the affidavits of the parties as he ought to have done, in his attempts to identify the material facts pleaded which are obviously undisputed or ought not to have been disputed (*Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu*). The learned JC had rightly concluded that the undisputed facts and admissions made by the defendants as apparent from the pleadings and the affidavits, were comprehensive and sufficient to determine and dispose of the core issues in the claim.

[35] On the facts before us, there is no dispute that the plaintiff is the registered proprietor of Lot 130. The provisional lease was registered to the plaintiff on 15 April 2013 and subsequently converted to Lot 130 on 2 September 2014. The defendants knew of the plaintiff's title over Lot 130 since 22 July 2013 (see para. 22 of the SOC against the third parties). The defendants together with Tuai Rumah Chabu Ak Makum of Rumah Chabu had, by a letter dated 7 January 2015 to the Chief Minister, asked for the revocation of the provisional lease (para. 4.1 of the SOC and admitted by the defendants in para. 7 of the SOD). The defendants have no title to Lot 130.

[36] Although at a glance there may appear to be a competing claim between the parties with the defendants demonstrating the long historical facts on the defendants' ancestors' occupancy to justify why their claim of NCR on Lot 130 should rank priority over and supersede the plaintiff's right as the registered proprietor, nothing really turned on this. We see no substance in the defendants' contentions that their claims over NCR involved material disputes of facts that ought to go for a proper trial, for the following reasons.

A [37] The defendants had made several admissions in their pleadings. These are judicial admissions. It is trite that judicial admissions in a pleading stand on a higher footing than evidentiary admission (*Yam Kong Seng & Anor v. Yee Weng Kai* [2014] 6 CLJ 285).

B [38] In para. 4.2 of the SOC, the plaintiff pleaded the following:

C 4.2 The longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of the said Land. The Resident's Office, Miri helped to facilitate amicable discussion. After discussion with the inhabitants and representatives of Rumah Chabu, the Plaintiff and the inhabitants of Rumah Chabu settled amicably; and Rumah Chabu acknowledged the Plaintiff's ownership of the said Land. The inhabitants of Rumah Chabu issued a letter dated 26.2.2015 to confirm the above.

The defendants' response can be seen at para. 8 of the SOD which reads:

D 8. In reference to paragraph 4.2, save for the longhouses of Rumah Chabu and Rumah Ramba do not lie within the boundaries of the said Land and the meeting facilitated by the Resident's Office, the Defendants have no knowledge of the arrangement made by the residents of Rumah Chabu with the Plaintiff and the Plaintiff is put to strict proof hereof.

[39] The plaintiff also pleaded at para. 15.3 of the SOC the following:

E 15.3 The Defendants allege that they own native customary rights over the said Land. However, the Defendants' settlement is not on the said Land nor do the Defendants cultivate on the said Land. In fact, the said Land was formerly under a Timber Licence with forestry activities since 1994.

F The defendants' response at para. 20 of the SOD reads:

G 20. Paragraph 15.3 is admitted and the Defendant aver that the said Land were the Defendants' reserved forest or *pulau galau* which have been reserved for many generations. The said *galau pulau* were only logged by the timber company who had asked permission from the defendants before the logging activity started. The defendant in fact gave permission or consent for the logging to be carried out in exchange for the logging company to assist the Defendants to build a road in their communal boundary (*pemakai menua*).

H [40] What the terms "*temuda*", "*pemakai menoa*" and "*pulau*" denote were described by Md Raus Sharif PCA (as His Lordship then was) in *TR Sandah Tabau* in these words:

I [27] the terms "*temuda*", "*pemakai menoa*", and "*pulau*" were extensively discussed by the Court of Appeal in Appeal No. 27. What emerged from the discussion is simply this; "*temuda*" denote the native custom of cultivating an area; "*pulau*" denote the native custom of setting aside and maintaining an area under primary forest from which they derived food, medicines, wildlife and other forest produce; and "*pemakai menoa*" denote the native custom of demarcating an area by the native community, both cultivated area and area set aside.

[41] Very significantly, the admissions made by the defendants were that firstly, their claim for NCR over the plaintiff's Lot 130 was as their forest reserve or *pulau galau*. This *pulau galau* was used as the hunting grounds for the defendants and their forefathers and to search for jungle produce, collect rattan and other necessities to meet the defendants' domestic needs pursuant to their adat or custom. Secondly, they did not have any settlement nor any cultivation on the plaintiff's Lot 130. The defendants only built small huts there for hunting or for gathering jungle produce. This confirmed the plaintiff's contention that the longhouses of Rumah Ramba and Rumah Chabu do not lie within the boundaries of the Lot 130.

[42] Further admissions as regards the defendants' *pulau galau* can also be gleaned from the affidavit evidence. Sim Kuang Heng deposed at para. 4 in encl. 57 the following:

4. I repeat that the Defendants do not have any settlement nor any cultivation on the said Land Lot 130 Block 3 Bakong Land District.

The said Land lies outside of Sungai Liam, on the right bank of Sungai Liam. This can be seen on the Defendants own map "M".

The Defendants' settlement of Rumah Ramba lies on the left bank of Sungai Liam. This can be seen on the Defendants own map "M".

Rumah Ramba from across the river Sungai Liam to the closet (sic) point of the said Land is at least one (1) kilometre away. This can be seen on the Defendants own map "M".

Therefore the Defendants' own settlement of Rumah Ramba do not lie within the said Land. Nor do the Defendants have or had any cultivation on the said Land.

[43] In his affidavit in reply in encl. 61, D1 again admitted that the defendants do not have any permanent settlement on Lot 130:

5. Reference to paragraph 4 of Encl. 57, I admit that the Defendants do not have any permanent settlement in the said Lease Lot 130 but the said Lease Lot 130 was occupied by the Defendants and the Defendants had control over the said area wherein the Defendants have reserved for many generations and timber companies who wishes to log in the said Land was required to ask permission from the Defendant. Prior to this, the Defendants have in fact gave permission or consent for the logging to be carried out in the said area in exchange for the logging company to assist the Defendants to build a road in their *pemakai menua*. Furthermore, within the said land, the Defendants built small huts whereby the Defendants used to go for hunting or for gathering jungle produce.

[44] The defendant's map marked "M" showed several undisputed facts. As was the finding of facts by the learned JC, the defendants' own settlement of Rumah Ramba do not lie within the boundaries of the plaintiff's Lot 130. Rumah Ramba and Rumah Chabu and the plaintiff's Lot 130 are separated

A by Sungai Liam. This river runs outside of Lot 130. Rumah Ramba is located at least one kilometre distance away from the nearest boundary point of Lot 130.

B [45] The map marked “M” is entitled “Peta Menunjukkan Sempadan Kawasan Tanah Hak Adat Bumiputra (NCR) Rumah Ramba, Sungai Liam Dan Rumah Chabu, Lepong Ajai, Bakong, Daerah Marudi, Bahagian Miri, Sarawak”. The communal map concerned claims for NCR not just by Rumah Ramba but also Rumah Chabu. The “nota” shows that “luas kawasan tanah NCR Rumah Ramba dan Rumah Chabu ialah lebih kurang 3,564.33 hektar” and “luas kawasan yang dituntut oleh Rumah Ramba dari Asco Green ialah 876.45.” The defendant admitted, in para. 9 of the SOD, to the fact that they had refused the plaintiff’s offer on 6 February 2015 for *ex gratia* settlement upon the same terms as that of Rumah Chabu. Although the defendants pleaded in para. 8 that they did not have knowledge of the arrangement made between Rumah Chabu and the plaintiff as regards the amicable settlement, C by the admission in para. 9 of the SOD, the defendant ought to have knowledge that Rumah Chabu had acknowledged the plaintiff’s ownership of Lot 130 and that there was no claim now by Rumah Chabu that Lot 130 was part of their NCR.

E [46] We need to point out that while the accuracy of the map marked “M” was not an issue with the plaintiff, the admissibility of the same was objected to by the third parties on the ground that it was not produced or drawn by a land surveyor licensed under the Land Surveyors Ordinance 2001 (Cap 40) nor was it approved by the Director of Lands and Surveys. The defendants at the other end, raised objection to the learned JC’s reference and reliance on the aerial photographs and the interpretation, saying that they should be F tendered through a proper trial.

[47] There is no dispute that the map marked “M” was not prepared by a licensed land surveyor. It was prepared as a community map to show the locality of the area claimed by the defendants.

G [48] However, it must be borne in mind that the learned JC had made reference to and reliance on the communal map in respect of encl. 51 and rightly so as the same was an uncontroverted piece of evidence as between the plaintiff and the defendants.

H [49] With regard to encl. 69, the grounds of judgment would show that the communal map marked “M” was not considered by the learned JC and did not form part of his decision. It was the aerial photographs that the learned JC had considered and the affidavits filed in relation thereto which again were uncontroverted, as will be seen later in this judgment.

I [50] As regards the plaintiff’s claim at para. 15.3 of the SOC that the entire area which includes Lot 130 was formerly under a timber license with forestry activities since 1994 and the defendants’ plea in para. 20 of the SOD

that their *pulau galau* were only logged by the timber company who had obtained permission from the defendants before starting the logging activities, the pleadings in our view do not show there were conflicting allegations of facts. The fact remained undisputed that there were logging activities carried out on Lot 130.

[51] Thus far, from a factual perspective, it is apparent that there were no disputed material facts or facts which ought not to have been disputed that would render the application under O. 14A inappropriate. We hasten to add that there was also no issues of fact interwoven with legal issues raised. The undisputed fact about the defendants' use of Lot 130 as their *pulau galau* is of great significance because the questions of law posed in encl. 51 turned on the issues of whether the defendant as a matter of law could claim NCR over Lot 130 and whether the NCR the defendant is claiming over the *pulau galau*, even if it is proven, has the force of law in light of the decided cases by our apex court. Even the grounds of appeal provide clear indications that there are emplaced pronouncements of law by our appellate courts over the questions of law posed.

[52] The questions of law posed by the plaintiff and the third parties are in our view clear cut and definite, discernible from the pleadings. The learned JC had correctly decided that the questions of law posed are suitable for determination without the full trial of the action and such determination would be final as to the entire claim and the counterclaim.

[53] We shall now proceed to look at the questions of law posed by the plaintiff.

First Question: Whether The Plaintiff Who Is The Registered Proprietor Of Lot 130, Block 3, Bakong Land District By Virtue Of The Issue Document Of Title For The Lease Of State Land Over Lot 130, Block 3 Bakong, Land District Issued By The Superintendent Of Lands And Surveys, Holds An Indefeasible Title?

[54] The learned JC answered this question in the affirmative. His Lordship cited the decisions in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, *Narinder Kaur v. Deyoh Opong & Ors* [1997] 2 CLJ 895, the Federal Court case of *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733 and the recent Federal Court case of *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19; [2018] 1 MLJ 77 to support his conclusion that upon being alienated with the issue of document of title over Lot 130, the plaintiff became a registered proprietor thereof and its title is indefeasible and can no longer be challenged by the defendants' NCR claims.

[55] The ambit and effect of s. 132 of the Sarawak Land Code and the indefeasibility of title conferred by the said provision was clearly established by the Federal Court in *TH Pelita Sadong (supra)*. The issues common to all parties in the appeals before the Federal Court in *TH Pelita Sadong* are, what

- A is the effect of a claim of NCR on the indefeasibility of title under the Sarawak Land Code and whether the positive finding of the existence of NCR would overrule the indefeasibility of title of land and the interest stated in the issue document of title issued after NCR was asserted, or would indefeasibility of title of the land prevail over such claim of NCR. The
- B Federal Court held that s. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over a land in the manner prescribed under the Sarawak Land Code and that a claim for NCR does not defeat the indefeasibility of title of land, even if the interest stated in the issue document of title was issued after NCR was asserted.
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[56] At the start of his submission, learned counsel for the defendants was magnanimous in conceding before us two important aspects of these appeals. One was with regard to the issue on indefeasibility of title. Notwithstanding their written submission wherein we were referred to several case law in support of the argument that the indefeasibility of title is a critical issue of fact and law which must be determined at the trial, the defendants did not dispute that indefeasibility of title is no longer an issue in the face of the decision in *TH Pelita Sadong*. The other was that there was no dispute that Lot 130 was a primary forest. We shall deal with the primary forest issue in a later part of this judgment.

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[57] The concession made by the defendants on the issue of indefeasibility only went to show that the learned JC's findings was in line with the established principles. Fraud was not an issue in the instant case. Fraud was not pleaded either against the plaintiff or the third parties. There was therefore an absence of any vitiating factor to defeat the plaintiff's right as the registered proprietor of Lot 130.

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[58] The defendant had not shown that their NCR had been created over Lot 130 in the manner prescribed under s. 5(2) of the Sarawak Land Code. The alienation of Lot 130 to the plaintiff had already taken effect even before the defendants wrote to the Chief Minister *vide* a letter dated 7 January 2015 to ask for the revocation of the provisional lease. The defendants knew of the grant of provisional lease granted to the plaintiff since 22 July 2013 but did nothing to assert their NCR then. Despite the defendants' claim that their NCR over Lot 130 was created and/or acquired prior to the 1 January 1958 and still subsists as such, the defendants were not issued with any title over the land.

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[59] Even if one is to assume that the defendants had created NCR over Lot 130 in the manner prescribed under the Sarawak Land Code, or had asserted their NCR over Lot 130 before the issuance of title to the plaintiff or the interest stated in the issue document of title was issued after NCR was asserted, on the authority of *TH Pelita Sadong*, s. 132 of the Sarawak Land

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Code pertaining to the plaintiff's indefeasibility of title remains applicable and the NCR claim does not defeat the indefeasibility of title of the plaintiff. We agreed with the submission by learned counsel for the plaintiff that the entire answer to the first question posed can be found to be on all fours with the binding precedent in *TH Pelita Sadong*. There is no reason why the case must go for trial on this specific issue.

Second Question: Whether The Defendants Who Are Claiming That Native Customary Rights Over The Plaintiff's Lot 130 By Virtue Of The Defendants' Allegation That The Same Area Is Their Customary Forest Reserve, Does Such A Custom Even If Proven, Have Any Force Of Law Against The Plaintiff?

Third Question: Whether The Defendants, Who Do Not Have Any Settlement Or Cultivation On The Plaintiff's Lot 130, Block 3, Bakong Land District, Are Entitled As A Matter Of Law To Claim Native Customary Rights Over The Said Lot 130, Block 3, Bakong Land District?

[60] The two questions of law above-mentioned are related and were taken together by the learned JC. His Lordship answered both questions in the negative. His Lordship opined that both questions could be determined based on the authority of *TR Sandah Tabau* where the Federal Court held that NCR claim by means of *pulau galau* and *pemakai menoa* have no force of law. The learned JC accepted *TR Sandah Tabau* as a binding precedent which had been applied consistently in many other cases.

[61] To recapitulate, the defendants contended that the learned JC had erroneously applied the wrong principles of law in adopting the decision in *TR Sandah Tabau* when he should have instead adopted the decision in *Nor Anak Nyawai (supra)* and *Madeli Salleh (supra)*.

[62] It was argued before us that although the outcome of the appeals in *TR Sandah Tabau (supra)* was a 3:1 majority in favour of the appellants but the Federal Court appeared to be split on the legal enforceability of the Iban customs of *pemakai menoa* and *pulau galau*. Learned counsel submitted that the definition of law as held by Raus Sharif PCA (as His Lordship then was) was not correct as Abu Samah Nordin FCJ, despite in agreement to allow the appeal, has held in no uncertain terms that in respect of the respondents' rights under the common law pursuant to art. 160 of the Federal Constitution (FC), the legal enforceability of the *pemakai menoa* and *pulau galau* was not a matter of law but a question of fact to be established by evidence before the court, and for that matter there was no sufficient evidence to support the claims by the plaintiff on the balance of probabilities. Premised as such, His Lordship found it unnecessary to answer the questions posed for determination. Reference was also made to the dissenting decision of Zainun Ali FCJ.

A [63] It was further argued by learned counsel for the defendants that the legal position on *pemakai menoa* and *pulau galau* is far from settled. The Federal Court in *Director Of Sarawak And Ors v. Nicholas Mujah Anak Ason And Ors* (Application No. 08-130-03-2014(Q)) had on 17 May 2017 granted leave to appeal on a similar question of law as regards the issue of *pemakai menoa* and *pulau galau*.
B Learned counsel mentioned yet another appeal pending before the Federal Court again on similar issues (he did not have the case in the bundle of authorities). Both appeals, according to him, are still pending on the date we heard these present appeals.

C [64] It will be observed that the contention by learned counsel on the so called wrong principles of law handed down by the majority decision *TR Sandah Tabau*, is nothing new. Similar line of arguments were echoed in previous decisions of this court in *Jeli Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors And Another Appeal* [2019] 8 CLJ 598; [2018] 7 AMR 209, in *Douglas Ding Jangan & Ors v. Government Of Sarawak & Ors* [2019] 4 CLJ 18; [2018] 7 AMR 156 and in *Government Of Sarawak & Anor v. Busing Anak Jali & Ors And Another Appeal* [2019] 4 CLJ 179; [2019] MLJU 10.
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E [65] In *Jeli Naga (supra)* this court speaking through Tengku Maimun Tuan Mat JCA (as Her Ladyship then was), accepted that the decision in *TR Sandah Tabau* was a majority decision and by the doctrine of *stare decisis*, it was a majority decision that the court should follow. Her Ladyship held at pp. 611 to 612 (CLJ); p. 221 (AMR):

F [52] By the doctrine of *stare decisis*, it was the majority decision that we should follow (see *Barat Estates Sdn Bhd & Anor v. Parawakan a/l Subramaniam & 335 Ors* [2000] 3 AMR 3030; *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd (dahulunya dikenali sebagai Syarikat Teratai KG Sdn Bhd (No 1))* [2006] 1 AMR 545; [2006] 1 MLJ 435) and it was our position that the decision of *TR Sandah* was a majority decision. We were thus not convinced that we should depart from the majority decision of the Federal Court in *TR Sandah*.
G Premised on *TR Sandah*, the learned judge was correct to dismiss the plaintiff's claim except for the cultivated area of 380 hectares as the plaintiff had no NCR over the balance of Lot 2 which was not cleared by the plaintiffs and/or their ancestors prior to January 1, 1958. As such, we did not see the need to consider the authorities cited on the merits of the plaintiffs' argument that the custom of "*pemakai menoa*" and "*pulau*" falls within the definition of law in Article 160 (2) of the Federal Constitution.
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I [66] In *Busing Anak Jali (supra)*, Zaleha Yusof JCA (as Her Ladyship then was) rejected a similar argument that the position was still not clear based on the judgment of Abu Samah Nordin FCJ in *TR Sandah Tabau*. Her Ladyship held that the Federal Court had dismissed the plaintiffs' claim in *TR Sandah Tabau* based on 3-1 decision.

[67] We noted that the appeal in *Nicholas Mujah Anak Ason (supra)* is pending before the apex court. However, we are of the considered view that *TR Sandah Tabau* is the prevailing authority on the issues of *pemakai menoa* and *pulau galau* in that such customary practices do not have the force of law. We are also in complete agreement with *JeliNaga, Douglas Ding Jangan (supra)* and *Busing Anak Jali* that the decision in *TR Sandah Tabau* was a case of a majority 3-1 decision and the majority decision was not split. Needless to say, we are bound by the majority decision in *TR Sandah Tabau*.

[68] The central issue in *TR Sandah Tabau*, is whether the Iban customs of *pemakai menoa* and the establishment of *pulau* enable the respondents in the respective cases to claim a valid NCR over the land they claimed and whether they are recognised by the laws in Sarawak. Md Raus Sharif PCA (as His Lordship then was) explained why the native customs of *temuda* which is cultivation of land for occupation is recognised in law and why *pemakai menoa* through the establishment of *pulau galau* do not have the force of law as can be seen from the following which we think merit reproduction:

[64] With respect we disagree. This is not a case where we are called upon to consider whether such a practice exist or otherwise. Rather, what is pertinent here is whether the practice which exist has any force of law. In art. 160(2) of the Federal Constitution, 'Law' is defined as follows:

Law includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law.

[65] The words 'having the force of law' in art. 160(2) of the Federal Constitution are highly important as these words qualify the types of customs and usages which could come under the definition of law. These important words 'having the force of law' must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.

[66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak state laws which has been defined to mean 'customs which the laws of Sarawak recognise'. This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under art. 160(2) of the Federal Constitution.

[67] We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in

- A the case of *Nor Anak Nyawai* wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of '*temuda*' which is cultivation of land for occupation. This custom is essential and
- B integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.
- C [77] Based on what we have discussed above, the native customs of '*pemakai menoa*' through the establishment of '*pulau*' falls short of the prerequisites as provided for under s. 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art. 160 of the Federal Constitution.
- D [79] For reasons adumbrated, we would answer the question 1 in the negative. We find that the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in the primary forest which natives, like the respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce.
- E [80] As to question 2, our answer is that the High Court and the Court of Appeal are not entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom of '*pemakai menoa*' and '*pulau*'. What the law of Sarawak had recognised in a claim for native customary rights is the custom or adat of '*temuda*'.
- F [81] As to the question 3, we would answer it in the affirmative. The Court of Appeal's decision in *Nor Anak Nyawai* that the rights of the native is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent of native of rights to land claimed under native customary rights in Sarawak.
- G [69] The learned JC has applied the correct law in arriving at his findings that both questions of law could be determined based on the authority of *TR Sandah Tabau*.
- H [70] It is trite that NCR claims are founded upon the concept of native's custom of continuous and unbroken occupation and once abandoned, whatever NCR was created or acquired previously over that land would be lost (see *Bisi Jinggot (supra)*; *Racha Urud*; *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555; *Douglas Ding Jangan*). The effect of the defendants' claim that they had consented to forestry activities by timber companies on the said lot, must be critically examined. Learned counsel for the defendants argued that the
- I Federal Court in *Madeli Salleh* held that occupation need not be actual occupation and there can be occupation without presence on the land so long as the natives have control over the land through supervision. In this context,

the defendants contended that when they consented to the timber company to operate, they had demonstrated some form of control over Lot 130, the extent of which should be a matter for the trial. It is to be observed that Md Raus Sharif PCA (as His Lordship then was) in *Md TR Sandah Tabau* had dealt with at length with *Madelis Salleh*.

[71] Having considered all evidence and authorities referred by the parties, we are constrained to say that the defendant's pleadings and affidavits on the purported dealings they had with the timber company, so as to demonstrate the alleged control they exerted over Lot 130, had not made out the case they contended to be. We are not persuaded by the contention that the defendant must be given the opportunity to establish the alleged control at the trial. Whether or not there was occupation, actual or otherwise, or whether such a consent or permission was given to a timber company, could all be ascertained from the pleadings and the affidavits.

[72] As we had mentioned earlier, the plaintiff pleaded at para. 15.3 of the SOC that Timber License No. T/0449 was issued by the Director of Forests, Sarawak in 1994 to Talented Foresight Sdn Bhd until its expiry in 2011. Talented Foresight Sdn Bhd was wound up in 2013 and a liquidator was appointed on 12 November 2013 (see para. 12.1 of defence to counterclaim). Even though the defendants made no specific mention as to the identity of the timber company they had given permission or consent for logging to be carried out, it is obvious that the timber company meant by them pointed to Talented Foresight Sdn Bhd. This is because nowhere in the pleadings or the affidavits did the defendants name any particular or any other timber company that could have undertaken the logging works and there was no denial to the plaintiff's reference to Talented Foresight Sdn Bhd having the timber concession from 1994 until 2013. The defendants are bound by the perimeter of their pleadings.

[73] As Talented Foresight Sdn Bhd's logging concession expired in 2013, the defendants' claim in the affidavit in encl. 61 that they had even obtained a grant from the Malaysian Palm Oil Board ("MPOB") to plant palm oil trees within Lot 130 is a non-starter. MPOB which was constituted under the Malaysian Palm Oil Board Act 1998 (Act 582) was only established on 1 May 2000 (Act 582 came into effect on 1 May 2000). It follows therefore that as the logging operations by Talented Foresight Sdn Bhd ended in the year 2011, any purported attempt by the defendants to plant palm oil would have been in the year 2012 (before the Lot 130 was alienated to the plaintiff in 2013). The plaintiff's assertion that when the plaintiff came to Lot 130 in the year 2013, there were no planted crops whatsoever therefore stands to reason. This brings to naught the defendants' contention that the timber company had operated with their consent.

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- A [74] *Madeli Salleh* does not in our view assist the defendants' case. Even if
we are to weigh in the defendants' argument that pursuant to *Madeli Salleh*,
their occupation need not be actual occupation and it would suffice as long
as the defendants have control over the land through supervision and
continual visitation, and even if assuming for a moment that the defendants
B had acquired NCR over Lot 130, which we say is not the case here, and had
consented to timber loggings, undisputedly to Talented Foresight Sdn Bhd,
on Lot 130 for over 20 years from 1994 until 2011 and followed by the
provisional lease to the plaintiff on 15 April 2013, that right would have been
lost. The uncontentious fact was that Talented Foresight Sdn Bhd had the
C benefit of the grant of timber concession that went unchallenged for that
length of time. And as it concerned the plaintiff, there was also no legal
actions for trespassing against them until the defendants made claim of their
alleged NCR sometime in January 2015. Support for this view is found in
the decision of the Court of Appeal in *Douglas Ding Jangan* where Tengku
Maimun Tuan Mat JCA (as Her Ladyship then was) said at p. 32 (CLJ);
D p. 169 (AMR):

- [50] In addition, the learned judge found that logging had taken place for
over 20 years. The concept of continuous occupation has always been
recognised as an essential feature of NCR to land. In *Director of Forests,*
Sarawak & Anor v. Racha ak Urud @ Peter Racha Urud & 5 Ors (and 4 Other
E *Appeals)* [2017] 4 MLJ 42, the respondents claimed that following the grant
by the Director of Forests, Sarawak, of timber licences and licences to
plant forests to the four appellants companies, the latter had trespassed
onto lands over which the respondents has acquired NCR. The Federal
Court held that on the facts, the respondents no longer possessed,
F planted or maintained their NCR lands in their previous settlements
where logging activities by the appellants had been carried out for about
20 years before the commencement of the suit against the appellants. The
Federal Court stated that it was inconceivable that the respondents would
not have known of the presence of the logging activities on the land for
over a period of 26 years had they been in occupation of the land and
that the uncontradicted evidence was in consistent with "occupation".
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- [51] Similarly in the instant case. Given the finding of fact by the learned
judge that logging had been carried out for more than 20 years, even if
the plaintiffs could establish any rights, which was not the case, the
plaintiffs' right would have been lost when the plaintiff permitted the land
to be used by Perbadanan Perusahaan Kemajuan Kayu Sarawak, the
H licensee of Timber Licence Nos. T/3190 and T/4176 and Kastima, the
logging contractor who are not natives.

[75] We now turn to the defendants' contention that the learned JC should
have followed the decision in *Nor Anak Nyawai* and *Madeli Salleh*.

- I [76] *Nor Anak Nyawai* was decided by Ian HC Chin J. The decision by Ian
HC Chin J in that case was overturned by the Court of Appeal in
Superintendent Of Lands & Surveys, Bintulu (supra) where Hashim Yusoff JCA

(as he then was) held that the common feature which forms the basis of the claim for native customary rights is the continuous occupation of land and following the decision of the High Court in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 that the claim should not be extended to areas where ‘they used to roam to forage for their livelihood in accordance to their tradition. Such view is logical as otherwise it may mean that vast areas of land could be under native customary right simply through assertions by some native that they and their ancestors had roamed or foraged the areas in search of food’. As the decision in *Nor Anak Nyawai* was overturned by the Court of Appeal, the defendants’ contention that the decision represents the correct position of law pertaining to claims over NCR land is untenable.

[77] We are mindful of the fact that in *Nicholas Mujah Anak Ason*, one of the questions for the determination of the Federal Court was whether the Court of Appeal’s decision in *Superintendent of Lands & Surveys, Bintulu* was a correct statement of the law relating to the extent and nature of rights to land claimed under the NCR in Sarawak. As at the date of hearing of these appeals, there was no decision handed down by the Federal Court pertaining to the challenge on the said statement of law.

[78] The correctness of the Court of Appeal’s decision in *Superintendent Of Lands & Surveys, Bintulu* however was the subject of Question 3 in *TR Sandah Tabau* and the same was affirmed by the majority decision as the passages below show:

[70] The decision of the Court of Appeal in *Nor Anak Nyawai* was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of Appeal in *Nor Anak Nyawai* is the correct statement of law. It is not only consistent with decisions of our courts in *Adong* and *Sagong* but also with other commonwealth countries that native customary law over land are founded upon the concept of native’s custom of continuous occupation. For example, in *Sagong*, the proprietary interest of the orang asli in their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs the position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the Sarawak Land Code *vide* s 5.

...

[75] Thus, we agree with the views adopted by the Court of Appeal in *Nor Anak Nyawai*. We find nothing objectionable in the views expressed by the Court of Appeal in that case. On the contrary, we find that the Court of Appeal in the present appeals had erred in failing to consider that basis on the various Orders of the Rajah that the rights to land could only be established by a native who had cleared the primary jungle for the purpose of farming or cultivation.

- A [79] Accordingly, the said ground of appeal lacks merit. We are bound to observe the findings above by the principles in *stare decisis*.
- [80] We shall next deal with the question posed by the third parties.
- B *Whether Having Regard To The Pleading And The Case Of Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 And Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors [2013] 6 CLJ 805; [2013] 5 MLJ 149 The Defendants Have Any Cause Of Action Against The First, Second And Third Parties For Claiming Native Customary Rights Over Forested Area, Which Are Still Primary Forest?*
- C [81] Notwithstanding the concession made by learned counsel for the defendants that Lot 130 was a primary forest and the aerial photographs attested to it, the defendant steadfastly maintained their objection that it was inappropriate to introduce the aerial photographs through affidavit evidence. This begs the question whether the objection could be sustained. And this entails an analysis of the third parties' case.
- D [82] In support of the application in encl. 69, Catherine had deposed to the following:
7. Based on my office records, the aerial photographs taken in the years 1947 and 1963 of the purported areas concerning Lot 130 Block 3 Bakong Land District (formerly Provisional Lease Lot 236 Balong land District) (hereinafter referred to as the "said Lease") claimed by the Defendants show that it is still primary forest (approx. 621 Ha.) in 1947 and 2.98% (18 Ha. Approx.) of the purported areas claimed as cleared area and 97.1% (603 Ha. Approx.) is still primary forest in 1963. A copy of the map showing the interpretation of the aerial photographs taken in the year 1947 and 1963 over the purported areas claimed by the Defendants is now shown to me and produced hereto marked "CU-3" and "CU-4".
- E
- F
- [83] Alexius in his affidavit gave a detailed account of his interpretation of the aerial photographs for the year before and after 1958 over Lot 130.
- G [84] The essence of the affidavits of Catherine and Alexius was to establish that Lot 130 was a primary forest. Catherine's affidavit unmistakably show that the aerial photographs taken in 1947 and 1963 over Lot 130 in exs. "CU-3" and "CU-4" illustrate clearly that Lot 130 was still primary forest in 1947 and is still a primary forest in 1963. The documents are in the custody of the Lands and Surveys Department, Miri Division. By virtue of s. 83(1) of the Evidence Act 1950, the documents are made by the authority of the Government of Sarawak and presumed to be so made and are accurate (see *TR Aling ak Anggau & Ors (Suing For And On Behalf Of The Residents Of RH Aling) v. Government of Malaysia & Ors [2013] 10 MLJ 131*). The defendants had the benefit of legal representation. They however chose
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- I not to adduce any rebuttal evidence, thus rendering the documents in

exhs. “CU-3” and “CU-4” uncontroverted (see *Racha Urud, and Sunrise Sdn. Bhd. v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; [1996] 3 MLJ 533). The concession effectively put to rest the defendants’ dispute that Lot 130 was a primary forest as well as conclusively attested to the third party’s exhs. “CU-3” and “CU-4”. Simply put, the status of Lot 130 being a primary forest has become an undisputed fact. If the defendants were no longer disputing that Lot 130 was a primary forest, what is there anymore to prove at the trial?

[85] We opined that the learned JC did not err when he relied on the affidavit evidence of Catherine and Alexius and in accepting exhs. “CU-3” and “CU-4”. We are inclined to think that the concession made by learned counsel would in the circumstances and most probably, have been based on the above-mentioned documents.

[86] The learned JC was also correct to hold, based on the authority of *Bisi Jinggut* that in order to claim for NCR, there must be clearing of virgin forest by the natives and since Lot 130 claimed by the defendant was still covered by virgin jungle in 1947 and 1963 as proven by exhs. “CU-3” and “CU-4”, the area could not have been cultivated or occupied by their ancestors. The common thread referred to in *Bisi Jinggut* is undoubtedly missing.

[87] The defendants’ ground of appeal that the issuance of title over unextinguished NCR land is illegal, null and void lacks merit. The law is that where the State land is encumbered by the native’s NCR, no alienation shall take place until all NCR have been surrendered or terminated or provisions for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with (*TH Pelita Sadong (supra)*; *Bisi Jinggut*). With the legal status of *pemakai menoa* and *pulau galau* having been firmly established by the Federal Court in *TR Sandah Tabau* to have no force of law, it follows to reason that such customary practices do not create rights or ownership to Lot 130 and they cannot be grounds for claims of NCR. Since the defendants do not have any NCR rights in or over Lot 130, any elements of extinguishment are not relevant. There is therefore no unconstitutional act by the third parties for the alleged claims made by the defendants. The learned JC was correct in his findings that the defendants have no cause of action against the third parties for claiming NCR over Lot 130.

[88] As mentioned earlier, we had dismissed both appeals. No order was made as to costs. The deposit to be refunded.

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